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2004 SEP 22 P 4: 09

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September 22, 2004

**BY HAND DELIVERY**

Mr. Lawrence H. Norton  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: MUR 5509

Dear Mr. Norton:

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2004 SEP 22 P 4: 29

On behalf of Kerry-Edwards 2004, Inc. and Robert A. Farmer as Treasurer ("Respondents"), this letter is submitted in response to the complaint filed by Lenora Fulani and the Committee for a Unified Independent Party ("the Complaint") and subsequently labeled MUR no. 5509. The Complaint should be immediately dismissed.

**I. Introduction**

The Commission may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation. *See* 11 C.F.R. §§ 111.4(a), (d) (2004). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. *See* Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2001).

This Complaint sets forth no facts to allege that Respondents violated any law. The Complaint alleges that Respondents have conspired to prevent Ralph Nader and his running mate, Peter Camejo, from appearing on the ballot, and that they broke federal civil rights laws by doing so. Yet it identifies "no source of information that reasonably gives rise to a belief in the truth of the allegations presented." *Id.* Because the Complaint alleges no actual conduct by Respondents, and because it relies entirely on conclusory allegations, it should be dismissed.

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Moreover, the Complaint fails to present any reason to believe why Respondents, even if they did challenge Nader and Camejo's ballot access, would have violated any Commission regulation as a result. Commission regulations permit Respondents to spend funds "to further [the] . . . candidate's campaign for election to the office of President or Vice President of the United States." 11 C.F.R. § 9002.11(a)(1). Contesting an opponent's access to the ballot falls squarely within this category.

For these reasons, the Complaint should be dismissed.

## **II. Legal Analysis**

### **A. Civil Rights Statutes**

The Complaint's first legal claim is that Respondents have violated "the civil rights statutes that prevent persons acting under color of state law, or participating in a conspiracy, to deprive others . . . of their constitutionally protected rights and freedoms." Complaint at ¶ 20.

There are several reasons why this legal claim should be dismissed.

#### **1. The Commission Has No Jurisdiction**

Complaints to the Commission may only address violations of the Federal Election Campaign Act of 1971, as amended, and chapter 95 or 96 of title 26. *See* 2 U.S.C. § 437g(a)(1) (2004). The Commission has no jurisdiction over violations of other federal laws, and complaints may not properly address these violations to the Commission.

#### **2. There Is No Allegation of Any Action by Respondents Or Illegal Action by Anyone**

The Complaint does not allege that Respondents participated in any of the activity that supposedly relates to this charge. The only specific, factual reference made to Respondents in the Complaint comes in Paragraph 13, where it repeats a statement by DNC Chairman McAuliffe "that neither the DNC nor the Kerry campaign is funding the effort." Compl. ¶ 13.

Indeed, all of the conduct alleged in the Complaint is attributed to someone else:

- unnamed "Democratic Party leadership" (Compl. ¶ 8);

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- unnamed "Democratic Party lawyers" (Compl. ¶ 9);
- "former Congressman Tony Moffet" and "Elizabeth Holtzman, the former Congresswoman from New York" (Compl. ¶ 10; *see also* Compl. ¶ 14);
- "Democratic National Committee Chairman Terry McAuliffe" (Compl. ¶ 11; *see also* Compl. ¶ 13);
- a "county prosecutor" in Charleston, West Virginia (Compl. ¶ 12);
- "the Multnomah County Democratic Party organization in Portland" (Compl. ¶ 12); and
- "government workers in the Office of House Speaker and Democratic Party State Chair Michael Madigan" (Compl. ¶ 12).

Even in these instances, however, the Complaint provides "no source of information that reasonably gives rise to a belief in the truth of the allegations presented." *See* Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960.

In short, the Complaint provides no facts whatsoever to suggest that Respondents did *anything* – lawful or not. It presents no specific facts to allege that *anyone* broke the law. For this reason, the Complaint should be dismissed.

### **3. The Statutes Cited in the Complaint Do Not Apply**

Presumably, the Complaint means to reference 42 U.S.C. §§ 1983 and 1985 (2004). The Complaint does not allege any facts to suggest that these laws were violated. Because Respondents have not acted under color of law, § 1983 is inapposite. And § 1985 requires that the conspiracy be motivated by racial, or other class-based, discriminatory animus, *AFL-CIO v. Scott*, 463 U.S. 825 (1983), of which there is no allegation. Mere political motivation does not amount to a colorable claim under § 1985. *See id.*

### **B. Improper Use of Public Funds**

The Complaint's second legal claim is that Respondents used public funds appropriated under 11 C.F.R. §§ 9008.7 and 9002.11 to deprive Nader and Camejo of

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access to the ballots. Convention funds may be used only to "defray convention expenses." *Id.* § 9008.7(a)(1). General election funds may be used only for "qualified campaign expenses." *Id.* § 9002.11(a). The Complaint alleges that such activities do not qualify as a proper use of public funds, because they violate federal and state law. *See id.* §§ 9002.11(a)(3), 9008.7(b)(2).

This second legal claim suffers from the same deficiencies as the first.

**1. There Is No Allegation That Public Funds Were Used in Any Way**

The Complaint does not contain any allegations that any publicly funded source paid for any alleged activities. The only allegation involving the Convention is that Mr. Moffet, while in Boston during the Convention, may have coordinated "a variety of anti-Nader activity." Complaint at ¶14. There is no allegation that any Convention funds were spent for this activity. Nor is there any allegation that Respondents spent general election funds in any way pertaining to the Complaint's allegations. For this reason alone, the complaint should be dismissed.

**2. If Funds Were Used, It Would Not Be an Impermissible Use**

The Complaint bases its allegation that general election funds were misused on the claim that the activities undertaken were in violation of federal and state law. However, the activities described by the Complaint are not illegal. Taken on its face, the Complaint describes a series of efforts to ensure that Nader and Camejo meet the standards required to appear on the ballot. These efforts include ensuring that they gathered enough signatures, that the signatures met the criteria set by state law, and that they were delivered in a timely fashion to state authorities. There would be nothing illegal about a presidential campaign using general election funds to ensure that its opponents were actually qualified to appear on the ballot.

In short, even if Respondents did use or direct the expenditure of appropriated funds to ensure that Nader and Camejo met the legal requirements to appear on the ballot, that would not violate any federal or state law and would otherwise be permissible under federal law and the Commission's regulations.

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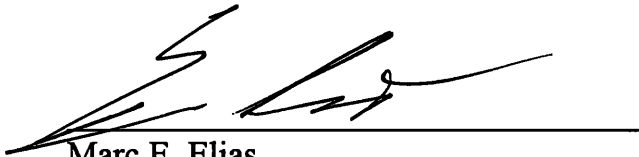


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### III. Conclusion

For the reasons detailed above, the Respondents respectfully request that the Commission dismiss the complaint.

Very truly yours,

Three handwritten signatures are written over a horizontal line. The first signature on the left is for Marc E. Elias, the middle one for Brian G. Svoboda, and the one on the right for Ezra W. Reese.

Marc E. Elias  
Brian G. Svoboda  
Ezra W. Reese  
Counsel to Kerry-Edwards 2004, Inc. and  
Robert A. Farmer as Treasurer

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